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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 572

HAROLD E. VICKERS,

Appellant,

vs.

TOWNSHIP COMMITTEE OF GLOUCESTER TOWNSHIP, *et al.*,

Appellees.

On Appeal from New Jersey Supreme Court

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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BRIEF IN OPPOSITION TO MOTION TO DISMISS

Harold E. Vickers, Appellant, files his brief in opposition to Motion to Dismiss by Appellees, Township Committee of Gloucester Township, et al. Significantly, the Motion to Dismiss contains no argument that the federal questions presented are less than substantial.

ARGUMENT

The federal constitutional questions were presented to and considered by the State courts.

The Appellees argue that the federal questions sought to be reviewed were not properly raised in the state courts, and were not passed on by the Court below. This conten-

tion is difficult to understand. Two basic contentions were advanced by the Appellant in the litigation below. In one, he challenged the validity of the amendment to the zoning ordinance in question on procedural grounds, alleging that the amendment was void because it was enacted in contravention of procedures set forth in the enabling statute, N.J.S.A. 40:55-35. In the other contention, he challenged the constitutional authority of the Township Committee of Gloucester Township to enact an ordinance which totally excluded trailer or mobile home parks. As noted at page 7 of the Statement of Jurisdiction, "the appellant raised the constitutional questions included in his Notice of Appeal to this Court upon the institution of his action challenging the validity of the Zoning Ordinance by asserting in paragraph 13 of his second complaint, that the zoning ordinance 'deprives plaintiff of the use of his property without due process of law, deprives plaintiff of the equal protection of the laws and is otherwise violative of the rights guaranteed to said plaintiff and others similarly situate by virtue of the Constitution of the State of New Jersey and of the United States of America.'" Observing that the phrases "due process of law" and "equal protection of the laws" do not appear in the Constitution of the State of New Jersey, 1947, the clear import of the language used, as well as the express reference to the Constitution of the United States, is to raise federal constitutional questions.

At each stage of the proceedings in the state courts it is clear that the court considered the constitutional questions raised by the pleadings,[1] although not expressly label-

[1] The Revised Rules of the Appellate Courts of New Jersey have abolished "assignments of error, bills of exceptions, grounds of appeal, specification of causes of reversal, and writs of errors", R.R. 1:2-9, 2:2-5. An appeal, where permitted, is taken by serving a notice of appeal. R.R. 1:2-8, 2:2-5.

ing them as federal constitutional questions. The opinions below discuss in great detail the lawful exercise of the police power and the arbitrariness and unreasonableness of the ordinance. The Appellees do not specifically assert that the references to constitutional questions are to the state constitution and not the federal constitution. Nevertheless, since the Constitution of the State of New Jersey, 1947, in its singular reference to the police power, (Article 4, Section 6, paragraph 2) states that, "The Legislature may enact general laws under which municipalities, other than counties may adopt zoning ordinances * * * *and the exercise of such authority shall be deemed to be within the police power of the state*", (Emphasis supplied) hereby creating such broad authority, one of the meanings which must be attributable to a discussion of the unlawful exercise of the police power is the question of a violation of the superseding constitutional rights guaranteed by the 14th Amendment to the Constitution of the United States.

There is ample language in the majority opinion of the Court below to reject the baseless assertions of the Appellees' Motion to Dismiss. In framing the issues of the case, the majority opinion noted, "In its answer, the Township contended it had the power to enact the ordinance under its zoning powers and *general police powers.*" (Emphasis supplied) (Statement of Jurisdiction, Appendix B, p. 7a). Thereafter, the principal discussion in that opinion relates to the question of whether the municipality exceeded its authority under the police power and the test used is whether the ordinance is reasonable and there is a substantial relation to the general welfare. On this issue, the majority expressly rejects the doctrine of *Gust v. Tp. of Canton*, 342 Mich. 436, 70 N. W. 2d 772 (1955) which held a similar ordinance invalid as not having a present substantial relationship to the general welfare. The

language used is almost identical to the test announced in *Village of Euclid v. Ambler Realty Corp.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. ed. 303 (1926). Moreover, in stating its decision, the majority in the Court below gave further evidence that it was deciding the constitutional questions in addition to applying New Jersey statutory law when it said, "* * * we hold that the Township Zoning Ordinance amendment barring trailer camps from its industrial district was a valid exercise of its zoning power and was adopted in conformity with the statutory requirements." (Statement of Jurisdiction, Appendix B, p. 23a).

The statement of the issues in the majority opinion which is cited by the Appellees (Motion to Dismiss, p. 4), does not compel a different conclusion. That reference merely states the issues in broad, general terms, which, contrary to the Appellees' position, are inclusive of the constitutional questions.

While admittedly not controlling on the question of whether a constitutional issue was presented to and decided by the New Jersey Supreme Court, brief reference to the dissenting opinion assists in the conclusion that federal constitutional questions were presented. The opening sentence of the dissenting opinion recites that the majority decided "that this particular municipality may constitutionally say, through the exercise of its zoning power that its residents may not live in trailers * * *" (Statement of Jurisdiction, Appendix C, p. 24a) Subsequently, in discussing the issue, the dissent makes several references to "Constitutional law", including an elaborate discussion of the leading opinion of this Court on the zoning power, *Village of Euclid v. Ambler Realty Corp., supra*, (Statement of Jurisdiction, Appendix C, p. 35a, 36a).

To afford the Supreme Court of New Jersey an opportunity to reconsider its ruling in light of the consequence

of its decision in the area of constitutional law, Vickers petitioned that Court for a rehearing. In his petition he urged, with reference to the sub-issue of proper judicial review of zoning ordinances, "Dangerous precedents in the area of Constitutional Law are created if the omission of Court inquiry is sanctioned". He urged also that "Mere assertion by local officials that zoning exclusion is warranted by aesthetic considerations becomes enough to prohibit constitutionally otherwise lawful business." The Supreme Court denied the petition for rehearing on its merits because no Justice who voted with the majority had moved a reconsideration.

Lest any doubt remain that the federal constitutional questions were seasonably urged in the Courts below, the appellant, following the license taken by the appellees in citing the briefs below which are not a part of the official record, reproduces two excerpts from his brief below.

Brief in Appellate Division of the Superior Court:

> "Zoning is fundamentally concerned with the proper utilization of land within a municipality; moreover zoning enactments must be in accordance with a comprehensive plan with emphasis upon districting, according to the particular suitability of land throughout the municipality. Kozesnik v. Montgomery Twp., 24 N. J. 154 (1957); Baskin v. Morristown, 21 N. J. 180 (1956). If the restrictions of a zoning ordinance go beyond those limits they are invalid inasmuch as they *deprive the owner of property rights without due process of law*." (Emphasis supplied.)

Brief in Supreme Court of New Jersey:

> "If the restrictions of a zoning ordinance go beyond those limits they are invalid *inasmuch as they deprive the owner of property rights without due process of law*." (Emphasis supplied.)

Under any one of a number of precedents, too numerous for complete citation, this Court has jurisdiction in the instant case. Two pertinent holdings of this Court may be noted. First, while it is required that a federal question be drawn in issue by presentation to the State Court, no particular form of words to that end is necessary, and it is sufficient if the effect of the judgment is to deny the claim of invalidity of a State statute. *New York, ex rel. Bryant* v. *Zimmerman*, 278, U. S. 63, 67, 49 S. Ct. 61, 73 L. ed. 184 (1928). Second, the right of review dependent on an adverse decision of a federal question exists in cases where the decision of the question involved is brought in some proper manner to the attention of the State Court, and decided, *or it appears that the judgment rendered could not have been given without deciding the federal question.* *Harding* v. *Illinois*, 196 U. S. 78, 86, 25 S. Ct. 176, 49 L. ed. 394 (1904).

The cases cited by the Appellees at pages 4 and 5 of the Motion to Dismiss are pertinent only so far as they announce the general principle that federal questions must be properly presented to the Court below for decision, and that Court must decide the matter on federal and not independent state grounds. These cases have no particular application to the instant case since the questions of waiver raised therein relate to requirements of state law for perfecting state appeals on constitutional questions, which were not complied with and thus waived; thereby precluding the raising of the questions on appeal to this Court. No such problem exists in the instant case.

There is a brief reference on page 5 of the Motion to Dismiss to the introduction of new facts and theories in the argument made in the appellant's Statement of

Jurisdiction at pages 17 and 18, which were not a part of the record below. However, many of the facts were referred to in the dissenting opinion below (Statement of Jurisdiction, Appendix C, pp. 40a and 41a) and are not presented to this Court on the merits of the questions presented, but to support the uncontested preliminary claim that substantial federal questions are presented.

CONCLUSION

It is respectfully submitted that the Appellees' Motion to Dismiss should be denied and that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

MILFORD SALNY,
Counsel for Appellant.